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No. 86-85

In the Supreme Court of the United States

OCTOBER TERM, 1986

LOUIS KENNETH RISKEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's conduct constituted a violation of the federal obstruction of justice statute, 18 U.S.C. 1503.

2. Whether the evidence at trial was sufficient to support petitioner's convictions for engaging in misleading conduct toward a witness.

3. Whether the outcome of the trial was materially affected by the government's failure to disclose certain evidence that might have been used to impeach a witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 788 F.2d 1361.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1986. A petition for rehearing was denied on May 22, 1986 (Pet. App. A28). The petition for a writ of certiorari was filed on July 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted on two counts of obstruction of justice, in violation of 18 U.S.C. 1503, and two counts of witness tampering, in violation of 18 U.S.C. 1512.[1] He was sentenced to a total

[1] Count One charged petitioner with obstructing justice, in violation of Section 1503, by endeavoring to hire someone to kill Vernon Bennett, a federal grand jury witness. Count Four charged petitioner

of 20 years' imprisonment with the provision that he would immediately be eligible for parole under 18 U.S.C. 4205(b)(2).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A2-A6). It established that in February 1984 a grand jury in the Southern District of Iowa was investigating possible violations of federal labor law committed by Teamsters Local 147 and its president, Vernon Bennett. Petitioner, the owner of an insurance agency, was subpoenaed by the grand jury to answer questions about his sale of insurance to the union, his relationship with Bennett, and his role in administering the union's health and welfare plan. *Id.* at A2-A3.

Petitioner subsequently asked an acquaintance, Randall Cason, whether he could find someone to commit a contract murder. Petitioner told Cason that a "union man" who was "involved" in a federal grand jury investigation might "cause him a problem" (Pet. App. A3). Cason told a colleague, Thaddius Greenfield, about his conversation with petitioner, and Greenfield expressed interest in committing the murder. Unbeknownst to Cason, however, Greenfield ocasionally served as a confidential informant for the FBI, and he reported Cason's remarks to the authorities. *Ibid.*

Greenfield and petitioner arranged a meeting three days later. Petitioner offered Greenfield $2,000 to kill a man he identified only as a "big shot" in the Teamsters who could incriminate petitioner before the grand jury. Petitioner

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with obstructing justice in violation of Section 1503 by making false and misleading statements to Randall Cason, another witness before the same grand jury. Count Two charged petitioner with witness tampering, in violation of Section 1512(a)(1), by engaging in misleading conduct toward Cason. Count Three also charged him with witness tampering, under Section 1512(a)(2)(A), by attempting to hire someone to kill Bennett.

then gave Greenfield $30 for his travel expenses, and the two agreed to meet again the following day. Pet. App. A3-A4.

Greenfield recorded their next meeting on a concealed tape recorder he had borrowed. During that meeting, petitioner gave Greenfield an additional $50 for expenses and told Greenfield that his intended victim was out of town but was expected to return to attend a niece's high school graduation. Petitioner said that the victim was generally "available" between 7:00 a.m. and 8:30 a.m., that Greenfield would probably need a silencer, and that petitioner's intentions were "for real." Pet. App. A4.

The FBI subsequently advised Bennett of petitioner's conduct. Bennett explained that he had been traveling during the past week and had returned to attend a niece's high school graduation. He also identified petitioner's voice on one of Greenfield's recordings. Bennett then telephoned his wife, who worked for petitioner, and told her that someone (whom he did not identify) had threatened his life. Mrs. Bennett left the office to meet her husband at his attorney's office and, upon her return, told petitioner where she had been and why. One hour later, Bennett's attorney telephoned Mrs. Bennett and advised her to go home. As she was leaving, petitioner asked her where she was going and she replied that she had been advised to return home. Pet. App. A5.

Shortly thereafter, petitioner placed a telephone call from a pay telephone at a neighborhood gasoline station. An attendant at the station overheard petitioner say that "the feds are on the case now * * * I tell you they are on the case," and "he's being interviewed right now." Pet. App. A5.

The following week Cason was subpoenaed to testify before the grand jury, and he reported that fact to petitioner. When petitioner asked what he would tell the grand jury, Cason said he would relate his earlier conversation

with petitioner. Petitioner then told Cason that "it was all a joke" and a "scam," and he promised to assist Cason in some way if Cason, in turn, did him a favor. Pet. App. A5.

2. Before trial, the district court ordered the prosecution to disclose to petitioner records evidencing payments made to Greenfield. Accordingly, the government revealed that the FBI had paid Greenfield $500 for his efforts in petitioner's case and $250 for his work in a previous case. On cross-examination at trial, an FBI agent also testified that while Greenfield had not been promised any additional payment in petitioner's case, the FBI made it a practice to pay informants "on results." Pet. App. A19-A20.

At petitioner's sentencing, his counsel informed the district court that he had learned that Greenfield would be paid an additional $5,000. The prosecuting attorney responded that he knew nothing about such a payment. The following month, the government informed the court and petitioner that after the trial the FBI had indeed authorized a payment of $5,000 to Greenfield. Pet. App. A20.

Petitioner argued on appeal that evidence of a potential financial reward for Greenfield should have been disclosed to him before trial for impeachment purposes and that the failure to disclose that evidence denied him due process. Finding that the existing record was not sufficient for consideration of petitioner's claim (Pet. App. A20-A21), the court of appeals remanded to the district court for an evidentiary hearing to determine: (1) whether any agreement regarding future payment existed between Greenfield and the FBI, (2) the terms and conditions of any such agreement, and (3) whether the government's failure to disclose such an agreement was material to the outcome of petitioner's trial under *United States* v. *Bagley*, No. 84-48 (July 2, 1985).

After three days of hearings (Pet. App. A33-A42), the district court found that while an "informant ledger sheet" had been prepared in the FBI's Omaha divisional office authorizing payments to Greenfield of up to $5,000, Greenfield was not in fact promised in advance of trial that he would be paid the authorized amount (*id.* at A36-A37, A41). Instead, the court found an "implied understanding" between the FBI and Greenfield that he might be paid following trial and that the amount of any such payment "might depend on whether [petitioner] was convicted," but that there "was no understanding as to the amount of the payment" (*id.* at A41-A42). The district court also concluded that while the disclosure of such an implied understanding may well have impeached Greenfield's credibility at trial, petitioner's convictions were based primarily upon the tape recordings. Because disclosure of the possibility of payment "could not have altered one word on those tapes," the government's failure to produce the records prior to trial did not materially alter the outcome of the case. *Id.* at A42.

3. The court of appeals affirmed. It rejected petitioner's challenge to his convictions under Section 1503, holding that 18 U.S.C. 1512 does not preempt prosecutions for obstructing justice by tampering with witnesses (Pet. App. A6-A15). The court also rejected petitioner's argument that the evidence was not sufficient to support his convictions for endeavoring to induce Cason to testify falsely before the grand jury (*id.* at A18). Finally, the court of appeals affirmed the district court's finding that the nondisclosure of information about Greenfield did not materially affect the outcome of the trial. Relying upon *United States* v. *Bagley, supra*, the court found that "there is no reasonable probability that the result of the trial would have been different had the $5,000 payment been disclosed to the defense and used * * * to cross-examine Greenfield" (Pet. App. A25).

ARGUMENT

1. Petitioner contends (Pet. 7-12) that his convictions under 18 U.S.C. 1503 were improper because 18 U.S.C. 1512 preempts all prosecutions for obstructing justice by tampering with witnesses. This contention has no merit.

The witness tampering statute, 18 U.S.C. 1512, prohibits misleading conduct towards a witness and the use of physical force against a witness in order to prevent him from testifying. The obstruction of justice statute, 18 U.S.C. 1503, prohibits endeavors to influence jurors or court officers as well as other efforts to obstruct the due administration of justice. Prior to its amendment in 1982, 18 U.S.C. (1976 ed.) 1503 also prohibited endeavoring to "influence, intimidate, or impede any witness," or injuring "any party or witness in his person or property * * * on account of his testifying or having testified * * *." When the witness tampering statute was enacted in 1982, Congress amended Section 1503 by removing the above-quoted prohibitions. Congress did not, however, alter the "omnibus" or "residual" clause of Section 1503 in any way. That clause generally prohibits "influenc[ing], obstruct[ing], or imped[ing], or endeavor[ing] to influence, obstruct, or impede, the due administration of justice * * *." Even prior to the 1982 amendment, courts regularly upheld prosecutions under the omnibus provision involving endeavors to influence the testimony of a witness (see, *e.g.*, *United States* v. *Johnson*, 605 F.2d 729, 730-731 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980)), as well as endeavors to prevent witnesses from testifying (see, *e.g.*, *United States* v. *Schaffner*, 715 F.2d 1099, 1103 (6th Cir. 1983)), including endeavors to murder potential witnesses (*United States* v. *McCarty*, 611 F.2d 220, 224 (8th Cir. 1979), cert. denied, 445 U.S. 930 (1980); *United States* v. *Missler*, 414 F.2d 1293, 1306 (4th Cir. 1969), cert. denied, 397 U.S. 913 (1970)). It was under this omnibus provision that petitioner was charged and convicted (see Pet. App. A12).

When Congress amends part of a statute but leaves another part intact—as it did in the case of Section 1503—the two provisions are given "as full a play as possible." *Markham* v. *Cabell*, 326 U.S. 404, 411 (1945). By retaining the omnibus clause of Section 1503, Congress left undisturbed the judicial decisions holding that the clause reached efforts to influence witnesses as well to as prevent them from testifying. This construction is reasonable because Sections 1503 and 1512 are directed at different goals: while Section 1503 protects judicial proceedings against corruption, by whatever means, Section 1512 is designed to protect the witnesses themselves. See Pet. App. A11-A14.

In the first case to address the issue after the enactment of the 1982 legislation, the Second Circuit took the view that Congress intended crimes against witnesses to be dealt with by Section 1512. *United States* v. *Hernandez*, 730 F.2d 895 (1984). In *Hernandez*, the defendant was convicted of threatening a witness in order to obtain documentary evidence, in violation of Section 1503. The court of appeals vacated his conviction under Section 1503, but there is some ambiguity in its opinion. The court stated at one point that Congress "intended to remove witnesses entirely from the scope of § 1503" (730 F.2d at 898). Elsewhere in its opinion the court stated that "Congress intended that intimidation and harassment of witnesses should thenceforth be prosecuted under § 1512 and no longer fall under § 1503" (*id.* at 899). Since the facts in *Hernandez* involved intimidation, the court's narrower statement is its holding. Accordingly, not until the Second Circuit has occasion to consider the issue in a case where a witness is neither intimidated nor harassed will its full reading of the relevant statutes be known. See *United States* v. *Beatty*, 587 F. Supp. 1325 (E.D.N.Y. 1984) (permitting prosecution under Section 1503 for urging

witnesses to give false testimony to grand jury and for providing misleading handwriting samples to grand jury). The decision in *Beatty* has been expressly endorsed in *United States* v. *Rovetuso*, 768 F.2d 809, 824 (7th Cir. 1985), cert. denied, No. 85-5843 (Jan. 13, 1986) (Section 1503 reaches efforts to arrange for the murder of a witness); *United States* v. *Lester*, 749 F.2d 1288 (9th Cir. 1984) (Section 1503 reaches noncoercive witness tampering, including hiding a witness); and *United States* v. *Wesley*, 748 F.2d 962 (5th Cir. 1984), cert. denied, No. 84-6156 (May 28, 1985) (omnibus clause of Section 1503 covers urging and advising a witness to testify falsely). Indeed, in *United States* v. *King*, 762 F.2d 232, 238 (1985), cert. denied, No. 85-1127 (Feb. 24, 1986), the Second Circuit itself noted that "[w]e agree with the courts in *United States* v. *Lester* and *United States* v. *Beatty* that the legislative history of § 1512 does not suggest that Congress intended that section, as enacted, to reach modes of conduct other than those there enumerated."

While there is tension between the position taken by the Second Circuit with regard to witness tampering and the position taken by every other circuit that has subsequently addressed the issue, the conflict is not clearly established, and it may be resolved as the lower courts have further experience with the 1982 legislation. In particular, the conflict in approach may largely abate if the Second Circuit is called upon to decide a case involving a form of witness tampering that would not be prosecutable under Section 1512. If the Second Circuit finds that form of conduct to be within the reach of Section 1503, the conflict will be reduced to a technical one of no great importance. On the other hand, if the Second Circuit holds that witness tampering that falls outside the reach of Section 1512 is also outside the reach of Section 1503, that court will have created a serious gap in the statutory coverage, and the

conflict will have sharpened. Unless and until the Second Circuit takes that step, we submit that it is unnecessary for this Court to review the question.

2. Petitioner also argues (Pet. 12-15) that the evidence at trial was insufficient to support his convictions for endeavoring to mislead grand jury witness Cason. Specifically, he claims (*id.* at 12) that his statement to Cason that the scheme to murder Bennett was simply a joke did not violate Section 1503 because it amounted to no more than a declaration of his state of mind at that time and consequently neither misled Cason nor influenced his testimony. Petitioner also contends (Pet. 15) that even if his statement was false, "there is no evidence" that he meant "to encourage [Cason] to testify other than truthfully" and thus no basis for his Section 1512(a)(1) conviction. The court of appeals, however, properly concluded (Pet. App. A18) that the jury was entitled to construe petitioner's remarks to Cason as an attempt to influence him to testify falsely.

Although petitioner insists that this characterization of the murder scheme as a "joke" or "scam" was entirely innocent, the jury had more than sufficient evidence before it to conclude otherwise. For example, petitioner did not tell Cason that the scheme was a "joke" until after petitioner learned that Cason had been subpoenaed and would reveal to the grand jury the substance of their initial conversation. In contrast, petitioner had earlier paid Greenfield's expenses and assured Greenfield that his intention to have Bennett murdered was "for real." The evidence also showed that immediately after Cason informed petitioner that he intended to tell the truth and petitioner responded by claiming the scheme was only a joke, petitioner promised to perform a favor for Cason if Cason did the same for him. The jury was entitled to infer that petitioner not only sought to mischaracterize what had been a

genuine contract murder scheme, but also attempted to persuade Cason to do the same before the grand jury as a "favor."

3. Finally, petitioner contends (Pet. 15-16) that the outcome of his trial was affected by the prosecution's failure to disclose the existence of an implied understanding that the FBI would make additional payments to Greenfield. Although the court of appeals agreed with the district court that the tape recordings, rather than Greenfield's testimony, "constituted the critical incriminating evidence against [petitioner]" (Pet. App. A26), petitioner now asserts that without Greenfield's testimony, the prosecution would have failed to establish either the identity of the putative murder victim or the basis for federal jurisdiction.

Petitioner ignores the fact that the intended victim, Bennett, himself testifed at trial. Bennett explained that he listened to a tape recording of Greenfield's conversation with petitioner, identified petitioner as one of the participants, and recognized himself as the intended victim by confirming that he was the target of a federal grand jury investigation and that he had returned from an out-of-town trip to attend his niece's graduation (see, *e.g.*, Pet. App. A5). With respect to petitioner's contention about federal jurisdiction, Cason testified at trial that he had appeared before a federal grand jury, and the gasoline attendant testified that he overheard petitioner state that "the feds are on the case now" (*ibid.*). There was, in short, ample unimpeachable evidence establishing both the identity of the intended victim as well as a basis for federal jurisdiction. The courts below were therefore correct in concluding that the failure to disclose the existence of an implied understanding that the FBI would make a further payment to Greenfield could not have affected the outcome of petitioner's trial.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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